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## Public Prosecutor v Mikail Tan Abdullah

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HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KCH-41 AC-1/1 OF 2018
SUPANG LIAN J
3 JULY 2018

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*Criminal Procedure — Appeal against acquittal — Prima facie case — Accused charged with offences under ss 323 and 506 of the Penal Code — Trial judge found that prima facie case not proven — Whether trial judge erred in dismissing discovery of minor old inimical as being inconsequential — Whether there was gap in prosecution's case — Whether trial court erred in requiring prosecution to prove elements of offence under s 324 of the Penal Code — Whether delay in reporting offence should be taken as evidence of concoction — Whether prosecution had proved prima facie case — Penal Code ss 323 & 506*

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*Evidence — Witness — Prosecution witness — Interested witnesses — Whether victims and complainants interested witnesses — Credibility of witnesses — Whether trial court erred in rejecting evidence of witnesses without proper analysis and consideration — Whether evidence concocted — Whether trial court erred in rejecting evidence of witness solely on one minor discrepancy — Whether challenge on evidence of prosecution witness amounted to evidence*

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This was an appeal against the order of acquittal of the learned magistrate who discharged and acquitted the accused of all charges at the end of the prosecution's case. The accused was charged with a total of six charges of causing hurt under s 323 of the Penal Code ('the Code') and two charges of criminal intimidation under s 506 of the Code to his two daughters. The magistrate found in relation to charges under s 323 of the Code that the evidence of PW3 and PW4 ought to be rejected as highly unreliable and doubtful as they were interested witness who were repeatedly reprimanded by their father who did not like them texting and mixing with strange boys. Further, their oral accounts also clashed with their own medical evidence as there was no visible marks, cuts, and/or lacerations found on the victims. For charges under criminal intimidation the learned magistrate found that there was inconsistencies in the story of PW4 in relation to where she was punched and the appellant's refusal to tender the respective medical reports which contradicted the evidence of PW4 who stated about the violent beatings. The magistrate also ruled that the stories of PW3 and PW4 were cooked up as there was a delay of more than three months in lodging the reports, wherein the delay gave them ample opportunity to concoct stories and synchronise evidence. The

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A appellant raised the following issues in the petition of appeal: (a) the magistrate erred in law and fact in putting too much consideration on the absence of injury for offences under ss 323 and 506 of the Code in which injury was not a sine qua non for the offences and failed to consider the explanation given by the witness about the injury; (b) the learned magistrate erred in law and in fact B in putting too much consideration into the delay in lodging the police reports without considering PW3's and PW4's explanation at all; (c) the learned magistrate erred in law and fact for failing to judicially evaluate the demeanour and character of PW3 and PW4 in court which was an important finding to make in such cases; and (d) the learned magistrate erred in law and fact for C failing to judicially appreciate all the evidence adduced by the appellant which in fact proved a prima facie case for the offences charged.

**Held**, allowing the appeal, quashing the acquittal of the respondent on all charges and ordering the accused to enter his defence on all the charges:

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(1) PW3 and PW4 were only examined two and a half months after the incidents of assault, therefore it was no surprise that the doctor only found a minor old inimical well healed 1/2 cm mark on the back of PW3's right hand. The magistrate had erred in dismissing the discovery of the said mark as being inconsequential. In fact, it was corroboration of E PW3's story of having sustained simple hurt in the hands of her father (see para 21).

(2) It was the prerogative of the prosecution to call any number of witnesses provided that the ingredients of the charge had been sufficiently proved. F PW3 and PW4's testimony concerning the assaults by their father were direct evidence and there was no requirement in law for corroboration of their evidence. Hence there was no gap in the prosecution's case as to the occurrence of the incidents and the identity of the perpetrator (see para 22).

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(3) A medical report is not a sine qua non for the prosecution of a case related to assault. Even though the complainants had testified that they were assaulted using various instruments, the fact remained that the respondent was being charged for the lesser offence and not under s 324 of the Code. The magistrate had erred in requiring the prosecution to H prove the elements of the offence under s 324 of the Code when the charges preferred were for the lesser offence under s 323 of the Code (see para 23).

(4) Delay in reporting an offence should not be taken as evidence of I concoction without more. The reason for the delay should be considered in light of the other relevant and admissible evidence available before coming to any conclusion. The learned magistrate had failed to refer, what more to examine the explanation given by the complainants (see para 28).

(5) It was erroneous, in fact strange, to brand PW3 and PW4 as interested witnesses when they were complainants and the alleged victims in this case. If the complainants and victims of crimes are treated as interested witnesses it would lead to an absurd situation where nearly every criminal prosecution would be doomed (see para 30).

(6) Even if there had been a bad motive on the part of PW3 and PW4, their evidence should not be rejected without proper analysis and consideration. And this the learned magistrate had failed to carry out. Both their evidence should be accepted as there was no sufficient evidence to show that they concocted or frame the respondent who was their own father. In fact the enmity, which PW3 and PW4 readily agreed to, was a ground for correct implication (see para 32).

(7) There was a total failure on the part of the learned magistrate to consider the principle that a court may, in the case of discrepancy of evidence, accept the relevant part and reject the other part. Instead, the magistrate had rejected PW4's evidence solely on one minor discrepancy. In this, the magistrate had erred and his finding wrong in law (see paras 34–35).

(8) A challenge on the evidence of a prosecution witness by the defence remained a challenge and did not amount to evidence unless the fact was admitted. PW4 was subjected to severe cross-examination but she withstood the scrutiny and was unshaken on her evidence. Thus, her credibility was intact and as stated earlier, the challenge remained a challenge. Based on the above reasons, the court found that the court below had wrongly evaluated the facts. The court was satisfied that the prosecution had proved a prima facie case on all the charges (see paras 37–38).

**[Bahasa Malaysia summary**

Ini merupakan satu rayuan terhadap perintah pembebasan majistret terpelajar yang melepaskan dan membebaskan tertuduh atas semua pertuduhan di akhir kes pendakwaan. Tertuduh dipertuduhkan dengan enam pertuduhan atas mendatangkan cedera dibawah s 323 Kanun Keseksaan ('Kanun tersebut') dan dua pertuduhan untuk ugutan jenayah dibawah s 506 Kanun tersebut keatas dua anaknya. Majistret membuat dapatan berkenaan dengan pertuduhan di bawa s 323 Kanun tersebut bahawa keterangan PW3 dan PW4 hendaklah ditolak kerana tidak boleh dipercayai dan diragui kerana mereka merupakan saksi yang berkepentingan yang telah dimarahi berulang kali oleh bapa mereka yang tidak gemar mereka menghantar SMS dan bergaul dengan lelaki yang aneh. Lanjutan itu, keterangan lisan mereka bercanggah dengan keterangan perubatan mereka kerana tiada kesan yang ditemua pada mangsa dapat dilihat. Untuk pertuduhan ugutan jenayah majistret terpelajar mendapati bahawa wujud percanggahan dalam cerita PW4 berkenaan dengan di mana beliau ditumbuk dan keengganan perayu untuk mengemukakan laporan perubatan

berkenaan yang bercanggah dengan keterangan PW4 yang menceritakan berkenaan dengan kejadian pukul yang ganas. Majistret juga memutuskan bahawa cerita PW3 dan PW4 direka kerana wujud tempoh masa 3 bulan tertangguh dalam membuat laporan polis, yang mana penangguhan tersebut memberi mereka peluang yang mencukupi untuk reka cerita dan menyelaraskan keterangan. Perayu membangkitkan isu-isu berikut dalam petisyen rayuan: (a) majistret terkhilaf di sisi undang-undang dan fakta semasa meletakkan terlalu banyak pertimbangan dalam ketiadaan kecederaan untuk kesalahan dibawah ss 323 dan 506 Kanun tersebut yang mana kecederaan bukanlah satu syarat untuk kesalahan tersebut dan gagal untuk menimbangkan penerangan yang diberikan oleh saksi berkenaan dengan kecederaan; (b) majistret terpelajar terkhilaf disisi undang-undang apabila meletakkan terlalu banyak penimbangan terhadap penangguhan membuat laporan polis tanpa menimbangkan langsung penerangan PW3 dan PW4; (c) majistret terpelajar terkhilaf di sisi undang-undang dan fakta kerana gagal untuk menilai tingkah laku dan perwatakan PW3 dan PW4 di mahkamah yang merupakan satu dapatan yang penting untuk dibuat dalam kes sedemikian rupa; dan (d) majistret terpelajar terkhilaf di sisi udnang-undang dan fakta kerana gagal untuk mengamati keseluruhan keterangan yang dikemukakan oleh perayu yang sebenarnya membuktikan satu kes prima facie untuk kesalahan-kesalahan yang dipertuduhkan.

**Diputuskan**, membenarkan rayuan, mengenepikan pembebasan responden atas semua pertuduhan dan mengarahkan tertuduh untuk membela diri atas semua pertuduhan:

(1) PW3 dan PW4 hanya diperiksa dua setengah bulan selepas kejadian serangan, oleh itu, adalah tidak hairan yang doktor hanya menjumpai satu kesan kecil lama yang telah sembuh 1/2 cm dibelakang tangan kanan PW3. Majistret terkhilaf dalam mengenepikan penemuaan kesan tersebut sebagai tidak penting. Sebenarnya ianya menyokong cerita PW3 yang telah cedera ditangan ayahnya (lihat perenggan 21).

(2) Adalah prerogatif pendakwaan untuk memanggil seberapa banyak saksi selagi mana intipati pertuduhan dibuktikan. Keterangan PW3 dan PW4 berkenaan serangan oleh bapa mereka merupakan keterangan terus dan tiada keperluan undang-undang untuk sokongan keterangan mereka. Oleh yang demikian, tiada kelompangan dalam kes pendakwaan mengenai terjadinya kejadian tersebut dan identiti pelaku tersebut (lihat perenggan 22).

(3) Satu laporan perubatan bukan syarat untuk kes pendakwaan berkenaan dengan serangan. Walaupun pengadu-pengadu telah memberi keterangan yang mereka diserang menggunakan pelbagai alat, fakta adalah bahawa responden dituduh dengan kesalahan yang lebih ringan dan bukan dibawah s 324 Kanun tersebut. Majistret terkhilaf dalam

memutuskan pendakwaan untuk membuktikan inti pati kesalahan dibawah s 324 Kanun tersebut walhal pertuduhan yang dikemukakan adalah untuk kesalahan yang lebih ringan dibawah s 323 Kanun tersebut (lihat perenggan 23).

(4) Penangguhan dalam melaporkan kesalahan tidak sepatutnya diterima sebagai keterangan yang menunjukan rekaan dan tidak lebih dari itu. Sebab penangguhan harus diberi pertimbangan bersama dengan keterangan lain yang relevan dan boleh diterima pakai sebelum sampai kepada apa-apa keputusan. Majistret terpelajar gagal untuk merujuk, apatah lagi meneliti penerangan yang diberikan oleh pengadu-pengadu (lihat perenggan 28).

(5) Adalah salah, dan aneh, untuk menyelar PW3 dan PW4 sebagai saksi berkepentingan apabila mereka merupakan pengadu dan dikatakan mangsa dalam kes ini. Sekiranya pengadu dan mangsa jenayah dilayan sebagai saksi berkepentingan ianya akan membawa kepada situasi tidak masuk akal di mana semua pendakwaan jenayah akan gagal (lihat perenggan 30).

(6) Jikalau wujud niat jahat dipihak PW3 dan PW4, keterangan mereka tidak harus ditolak tanpa penelitian dan penimbangan. Majistret terpelajar telah gagal untuk lakukan perkara ini. Kedua-dua keterangan mereka harus diterima kerana tiada keterangan yang mencukupi untuk menunjukan bahawa mereka telah reka cerita atau menganaiya responden yang merupakan bapa mereka. Walhal permusuhan, yang PW3 dan PW4 akui, merupakan satu asas betul untuk menunjukan penglibatan (lihat perenggan 32).

(7) Wujud kegagalan dipihak majistret terpelajar untuk mengambilkira prinsip yang satu mahkamah boleh, dalam kewujudan percanggahan keterangan, menerima bahagian yang relevan dan menolak bahagian yang lain. Sebaliknya majistret telah mengetepikan keterangan PW4 berdasarkan satu percanggahan kecil. Dalam ini, majistret telah terkhilaf dan dapatannya adalah salah di sisi undang-undang (lihat perenggan 34–35).

(8) Cabaran atas keterangan saksi pendakwaan oleh pembelaan kekal sebagai cabaran dan tidak menjadi keterangan kecuali mana fakta tersebut diakui. PW4 telah menjalani pemeriksaan balas namun beliau telah bertahan pemeriksaan dan tidak terganggu atas keterangannya. Oleh itu, kredibilitinya tidak tercabar dan seperti mana yang dinyatakan terdahulu, satu cabaran kekal sebagai cabaran. Atas sebab-sebab di atas, Mahkamah mendapati mahkamah terdahulu telah terkhilaf dalam mengamati fakta-fakta. Mahkamah berpuas hati bahawa pendakwaan telah membuktikan satu kes prima facie atas kesemua pertuduhan (lihat perenggan 37–38).]

**Notes**

For cases on appeal against acquittal, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 186–230.

For cases on prosecution witness, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3671–3672.

**Cases referred to**

*Chamaru Ram v State of HP* 2005 CriLJ 1943, HC (refd)

*Hairani Sulong v PP* [1993] 2 CLJ 79, HC (refd)

*Hii Chie Ping & Anor v PP* [2018] 7 MLJ 843, HC (refd)

*Mitter Sen and Ors v State of UP* AIR 1976 SC 1156, SC (distd)

*PP v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 (refd)

*PP v David Chung Nyuk Vui* [2007] MLJU 493; [2008] 3 CLJ 302, HC (folld)

*Timhar Jimdani Ong & Anor v PP* [2010] 1 MLJ 775; [2010] 3 CLJ 938, CA (refd)

**Legislation referred to**

Penal Code ss 323, 324, 325, 506

*Kamal Baharin bin Omar (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.*

*Shankar RP Asnani (Daniel Ling with him) (Thomas, Shankar Ram & Co) for the respondent.*

**Supang Lian J:**

INTRODUCTION

**[1]** The respondent, Mikail Tan Abdullah, has two young daughters by the name of Myra Aishah and Nadia. Nadia is nearly 22 years old whereas Myra is about 18. On 5 August 2016, Myra ('PW3') and Nadia ('PW4') lodged separate police reports against their father for causing hurt to them on various occasions from the year 2015–2016. This led to the police commencing investigations. The police concluded that there were several occasions in 2015 and 2016 that the respondent had voluntarily caused hurt to his daughters. In addition, the police concluded that the respondent had threatened to kill Nadia by pointing shear and machete at her on two different occasions in August 2015 and January 2016.

**[2]** Consequently, the respondent was charged in the magistrates' court as follows:

Criminal Trial No KCH-83–528/8 of 2016

First Charge

That you, on 22.5.2016, at about 3.00 pm, at a house located at No 39, Jalan Dagok Barat, in the district of Kuching, in the State of Sarawak, voluntarily causes hurt to one Myra Aishah bt Mikail Tan (NRIC No: 001020-13-1708) and you have thereby committed an offence punishable under section 323 of the Penal Code.

Second Charge

That you, sometime at the end of September 2015, at about 4.00 pm, at a house located at No 23, Lorong A9, Taman Vision BDC, in the district of Kuching, ... voluntarily causes hurt to one Myra Aishah bt Mikail Tan ... and you have thereby committed an offence punishable under section 323 of the Penal Code.

Third Charge

That you, in the month of February 2015, at about 9.30 pm, at a house located at No 39, Jalan Dagok Barat, in the district of Kuching, ... voluntarily causes hurt to one Myra Aishah bt Mikail Tan ... and you have thereby committed an offence punishable under section 323 of the Penal Code.

Criminal Trial No KCH-83–529/8 of 2016

First Charge

That you, on 22.4.2016, at about 2.00 pm, at a house located at Lorong Bakti 1A, Taman Norhasmita Ikhlas, Jalan Sultan Tengah, in the district of Kuching, in the State of Sarawak, voluntarily causes hurt to one Nadia bt Mikail (NRIC No: 961224-13-5530) and you have thereby committed an offence punishable under section 323 of the Penal Code.

Second Charge

That you, on 7.4.2016, between 3.00 am to 4.00 am, at a house located No 39, Jalan Dagok Barat, in the district of Kuching ... voluntarily causes hurt to one Nadia bt Mikail ... and you have thereby committed an offence punishable under section 323 of the Penal Code.

Third Charge

That you, in the month of August 2015, at about 2.00 pm, at a house located at No 39, Jalan Dagok Barat, in the district of Kuching, ... voluntarily causes hurt to one Nadia Binti Mikail ... and you have thereby committed an offence punishable under section 323 of the Penal Code.

Criminal Trial No KCH-83–530/8 of 2016

First Charge

That you, in the month of January 2016, between 9.00 am to 10.00 am, at a house located at No 23, Lorong A9, Taman Vision BDC, in the district of Kuching, in the State of Sarawak, commits criminal intimidation by threatening to kill one Nadia bt Mikail ... by pointing shears to her with intent to cause alarm to the said Nadia bt Mikail and you have thereby committed an offence punishable under section 506 of the Penal Code.

Second Charge

> That you, in the month of August 2015, at about 2.00 pm, at a house located at No 39, Jalan Dagok Barat, in the district of Kuching, ... commits criminal intimidation by threatening to kill one Nadia bt Mikail ... by pointing a machete to her neck with intent to cause alarm to Nadia bt Mikail Tan and you have thereby committed an offence punishable under section 506 of the Penal Code.

**[3]** On 3 January 2018, the learned magistrate acquitted and discharged the respondent from all charges at the conclusion of the prosecution's case.

## FINDINGS OF THE LOWER COURT

**[4]** On a perusal of the grounds of decision (at pp 30–33 ROA Vol 1), the learned magistrate gave the following reasons for ruling that the prosecution had failed to make out a prima facie case against the accused.

### VOLUNTARILY CAUSING HURT UNDER S 323 OF THE PC

**[5]** The prosecution submitted that it was the case for the prosecution that the entire cross-examination by the defence was centred on the absence of injury on the body of both the complainants. However, the law does not require any injury to be present for this offence. Bodily pain is sufficient for the first element to be fulfilled. It was for this reason that the charges preferred against the appellant in the first place are under s 323 and not s 324 or 325 of the Penal Code.

**[6]** The evidence of Myra (PW3) and Nadia (PW4) ought to be rejected as highly unreliable and doubtful, especially when they are interested witnesses who were repeatedly reprimanded by their father, the accused, who did not like them texting and mingling with strange boys (an admitted fact by PW3 but PW4 tried to conceal and answered 'what?' but admitted later).

**[7]** The oral account of the events by PW3 and PW4 relating to each of the eight charges that both of them had severe beatings clashed with their own medical evidence in exhs D1 and D2 in that the doctor who did full examination of PW3's and PW4's full body on 6 August 2016 found no apparent or visible marks, no cuts and/or lacerations on them, save for an old inimical well healed 1/2 cm mark on PW3. This raised serious doubts on the credibility of the story of PW3 and PW4 smacked (SIC) by D1 and D2.

**[8]** PW3 and PW4 had testified of the violent beatings by the appellant using multiple cane or dipper which had inflicted injuries on them. The medical report is relevant to support the allegations of violent beatings and the

injuries inflicted. As such the report from the doctor to support the same is a must. Without these evidence the said allegations remain mere allegations. The learned magistrate said that he was applying *Hii Chie Ping & Anor v Public Prosecutor* [2018] 7 MLJ 843 and *Mitter Sen and Ors v State of UP* AIR 1976 SC 1156 in support.

CRIMINAL INTIMIDATION UNDER S 506 OF THE PC

**[9]** In this regard, the learned magistrate found as follows.

**[10]** First, the threat uttered by the accused against PW4 was 'I am going to kill you I wish you never been born'. PW4 alleged that when the accused uttered the threat, he was pointing the machete at her throat.

**[11]** Second, there was inconsistency in the story of PW4. In court she testified that she was punched in the stomach. However, her police report P6 refuted such stories and showed she was punched in the head.

**[12]** Third, PW4 spoke so much about violent beatings leaving her with severe injuries and scratches. But, the prosecution had conveniently refused to refer PW4 and PW3 to D1 and D2, their respective medical reports, which contradicted their evidence.

**[13]** Fourth, PW4 admitted that the accused has no reason to beat or threaten her and PW4's answers showed she has an axe to grind.

**[14]** Fifth, the police reports marked P5 and P6 were lodged on 5 August 2016. There was a delay of more than three months in lodging the reports as there were no complaints of beatings for the months of June, July and August 2016. Hence, PW3's and PW4's stories were cooked up. Further, the delay gave them ample opportunity to concoct stories and synchronise evidence. In support, the learned magistrate relied on the observations of the court in *Chamaru Ram v State of HP* 2005 CriLJ 1943 where there was a delay of eight days.

**[15]** Sixth, for the charge to stand under s 506 of the PC, PW4 must have felt alarm or some kind of fear by the threat or act of the accused. PW4's testimony that she felt alarmed was strongly challenged by the defence especially as to the credibility.

**[16]** These were the reasons given by the learned magistrate for his finding that the prosecution had failed to adduced credible evidence to prove each ingredient of the offences with which the accused stood charged.

ISSUES RAISED IN THE APPEAL

**[17]** The issues raised in the petition of appeal are:

(a) the learned magistrate erred in law and in fact in putting too much consideration on the absence of injury for offences under ss 323 and 506 of the Penal Code in which injury is not a *sine qua non* for the offences and failed to consider the explanation given by the witnesses about the injury;

(b) the learned magistrate erred in law and in fact in putting too much consideration into the delay in lodging the police reports without considering PW3's and PW4's explanation at all;

(c) the learned magistrate erred in law and in fact for failing to judicially evaluate the demeanour and character of PW3 and PW4 in court which is a very important finding to make in such cases; and

(d) the learned magistrate erred in law and in fact for failing to judicially appreciate all the evidence adduced by the appellant which in fact proved a prima facie case for offences under ss 323 and 506 of the Penal Code.

ABSENCE OF PHYSICAL INJURY

**[18]** As stated earlier, one of the grounds for the learned magistrate finding that there was serious doubt in the credibility of the story of PW3 and PW4 is that the allegations of severe beatings are not borne out in the medical reports D1 and D2.

**[19]** The appellant submits that the finding is misconceived because the learned magistrate had failed to consider that there was a time gap between the date the injuries were inflicted and the date of medical examination. For CT No 83–528/8 of 2016, the hurt was inflicted on 22 May 2016; end of September 2015 and February 2015. For CT No 83–529/8 of 2016, the hurt was inflicted on 22 April 2016, 7 April 2016 and August 2015. It can be seen that the last incident in the case of Myra was on 22 May 2016 and on 22 April 2016 in the case of Nadia. The medical examinations were done and the reports prepared on 6 August 2016. This was 2 1/2 months after the last incident for Myra and 3 1/2 months after the last incident in Nadia's case. According to the appellant it is highly unlikely that the marks of injuries on the bodies of the complainants would be visible at the time of medical examination.

**[20]** In response the respondent had repeated the arguments laid before the trial court and said that the appellant should have called Dr Yang Xiang Yun who had examined Myra and Nadia as a witness.

**[21]** With respect, I agree with the appellant that the learned magistrate had erred in applying *Mitter Sen and Others*. The facts of that case can be distinguished because unlike the complainants in the present case, the victims there were treated immediately after sustaining the injuries. In all probability, the injuries sustained would still be fresh and visible. As such, the contradiction between the oral evidence in court and the expert evidence became relevant there. Whereas in the present appeal, Myra and Nadia were only examined by the doctor more than 2 1/2 months after the incidents of assault. It was no surprise that the doctor only found a 'minor old inimical well healed 1/2 cm mark' on the back of PW3's right hand. To my mind, the learned Magistrate had erred in dismissing the discovery of the 1/2 cm mark on PW3's hand as being inconsequential. It might have been a small scar, but it was corroboration of PW3's story of having sustained simple hurt at the hands of her father. This was the very evidence that the defence said was non-existent in the medical reports.

**[22]** As for not calling the doctor to testify, it is well settled that it is the prerogative of the prosecution to call any number of witnesses provided that the ingredients of the charge have been sufficiently proved: see *Public Prosecutor v David Chung Nyuk Vui* [2007] MLJU 493; [2008] 3 CLJ 302. PW3 and PW4 had come forward to testify of the assaults by their father. This is direct evidence. There is no requirement in law for corroboration of their evidence. Hence, there was no gap in the prosecution's case as to the occurrence of the incidents and the identity of the perpetrator. In any case the doctor had prepared his reports and the defence had relied and submitted extensively on them. There was nothing further that the good doctor could enlighten the court with.

**[23]** In any event, I respectfully agree with Hamid Sultan Abu Backer JC, as he then was, when he said in *David Chung*'s case, that a medical report is not a *sine qua non* for the prosecution of a case related to assault. As His Lordship had stated in that case, if the court is satisfied from the evidence adduced that there was assault, the elements of the section is satisfied. As in *David Chung*'s case, the charges against the respondent are under s 323 of the Penal Code. Even though the complainants had testified that they were assaulted using various instruments, the fact remains that the respondent is charged for the lesser offence and not under s 324. In my view, the learned magistrate had erred in requiring the prosecution to prove the elements of the offence under s 324 when the charges preferred are for the lesser offence under s 323.

A DELAY IN LODGING THE POLICE REPORTS

**[24]** The learned magistrate found that the stories of PW3 and PW4 were cooked up because there was a delay of three months in lodging the police reports.

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**[25]** It is clear from a reading of the grounds of decision that the learned magistrate had totally ignored the explanation given by the complainants for the delay.

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**[26]** PW3 in explaining the delay gave evidence that at first she just bore the ill treatment by her father because 'he was my father'. She decided to press charges against her father because he was getting more aggressive towards her sister and her mother. Although she was hit the least, her father was getting so D angry that it was like every day he would be in a bad mood. Hence, she went to the police station with her mother and sister to press charges.

**[27]** As for PW4, she said that it was getting bad in the last few years as her father would not let her leave the house without him. He hit her everyday over E trivial matters like temperature and if she did not close the windows at five o'clock. She took a long time to lodge the report because she was so scared and did not tell anyone except her friend. Her father threatened to kill her, her sister and her mother if she told anyone. He also said that he would find her and kill her if she told anyone. She believed him and was scared and still is. She finally F lodged the report because he was beating them every day and he hit their mother so badly that she could not move her fingers. It was too much and she was scared something bad was going to happen to her.

G **[28]** It has been said before, and I respectfully agree, that delay in reporting an offence should not be taken as evidence of concoction without more. The reason for the delay should be considered in the light of the other relevant and admissible evidence available before coming to any conclusion: see *Hairani Sulong v Public Prosecutor* [1993] 2 CLJ 79 at p 82 (CLJ). In the present H appeal, the issue is not whether the explanation given by the complainants was reasonable. Rather, the learned magistrate, in questioning the delay in lodging the police reports, head totally failed, in the grounds of decision, to refer, what more to examine the explanation given by the complainants. I agree with the appellant that this made the finding of the learning magistrate wrong in law.

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DEMEANOUR AND CHARACTER OF THE COMPLAINANTS

**[29]** Another ground for doubting the evidence of PW3 and PW4, the learned magistrate said, is that they are interested witnesses who were

repeatedly reprimanded by their father who did not like them texting and mingling with strange boys.

**[30]** It is erroneous, in fact strange, in my view, to brand PW3 and PW4 as interested witnesses when they are the complainants and the alleged victims in this case. If complainants and victims of crimes are treated as interested witnesses, it would lead to the absurd situation where nearly every criminal prosecution would be doomed. This cannot be the correct position in law.

**[31]** The respondent had contended further that PW3 and PW4 harboured hatred and anger towards their father for reprimanding them for texting and mingling with strange boys and therefore had a motive to frame him. I can do no better than to quote from *Sarkar's Law of Evidence* (17th Ed Reprint 2011, Vol 1) at p 73:

> Inimical witnesses — The testimony of inimical witnesses is to be considered with caution, the credit worthy testimony of eye-witnesses cannot be rejected merely on the ground that there was enmity between the prosecution and accused party ... Testimony of eye-witness which is consistent and convincing cannot be rejected on mere existence of enmity. Since enmity alleged was motive for crime ... Credible and cogent evidence cannot be discarded merely because there was animosity between the said prosecution witness and accused persons ... If the prosecution case itself alleged that the accused person came to beat complainant the evidence of witnesses who were injured, could not be rejected on ground of enmity ... It is well known that enmity is a double edged weapon. It can be ground for false implication, but it can also be a ground for correct implication ... It is settled law that merely because there are dispute between the parties or that the prosecution witnesses are on inimical terms with the accused, their evidence need not be discarded. The Court would be required to analyse the evidence of the related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence the version given by the witness appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence.

**[32]** To my mind, even if there had been a bad motive on the part of PW3 and PW4, their evidence should not be rejected without proper analysis and consideration. And this the learned magistrate had failed to carry out. Both their evidence should be accepted as there was no sufficient evidence to show that they concocted or frame the respondent who is their own father. In fact the enmity, which PW3 and PW4 had readily agreed to, was a ground for correct implication.

**[33]** The learned magistrate also found inconsistencies between PW4's evidence in court and her police report (P6) on the exact location she was punched by the respondent ie either on the stomach (oral evidence) or on the head (P6). I agree with the appellant that although there was a discrepancy

here, the learned magistrate failed to consider the following:

(a) the first charge did not specifically state the manner in which the respondent inflicted the hurt on PW4; and

(b) based on the evidence of PW4, other than the head or stomach, the respondent had hit her by slapping her on the face and on her back; continued kicking and hitting her with water bottle; dragged her into the bedroom by pulling her hair to the extent PW4 did not realise what had happened to her.

**[34]** It is settled by well-established authorities such as *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 at p 19 and *Timhar Jimdani Ong & Anor v Public Prosecutor* [2010] 1 MLJ 775; [2010] 3 CLJ 938 paras [14]–[16] that the court may, in the case of discrepancy of evidence, accept the relevant part and reject the other part. As stated in *Datuk Harun*'s case 'The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of the witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is therefore, necessary to scrutinise each evidence carefully as this involves the question of weight to be given to certain evidence in particular circumstances'.

**[35]** In the present appeal, there was a total failure on the part of the learned magistrate to consider this principle. Instead, he had rejected PW4's evidence solely on one minor discrepancy. In this he had erred and his finding wrong in law.

**[36]** Finally, the learned magistrate found that PW4's testimony that she felt alarm by the threat or act of the Respondent was strongly challenged by the defence especially as to credibility.

**[37]** First of all, a challenge on the evidence of a prosecution witness by the defence remains a challenge and does not amount to evidence unless the fact is admitted. This is well settled principle for which no authority need be cited. PW4 was subjected to severe cross-examination but she withstood the scrutiny and was unshaken on her evidence. Thus her credibility was intact and as I said, the challenge remains a challenge.

CONCLUSION

**[38]** For the reasons stated above, I am satisfied that the facts established by the evidence led by the prosecution disclose that the court below had wrongly evaluated the facts. The prosecution instead had proved a pirma facie case on all

the charges. I am therefore compelled to intervene. The appeal succeeds and the acquittal of the respondent on all charges is quashed. The respondent is ordered to enter his defence on all the charges.

**[39]** Since the trial magistrate had left the service, the defence of the respondent has to be heard by the succeeding magistrate. I order the case remitted back to magistrates' court 1 for the defence to be called. The case is to be mentioned before the learned magistrate tomorrow 4 July 2018 at 9am.

**[40]** The respondent is released on bail of RM3,000 and one local surety in the same sum. The respondent is to deposit the sum of RM3,000 by today.

*Appeal allowed; acquittal of respondent on all charges was quashed; and respondent was ordered to enter his defence on all charges.*

Reported by Izzat Fauzan